Supreme Court, U.S.
FILED
SEP 26 2008
OFFICE OF THE CLERK

No. 08-278

IN THE

Supreme Court of the United States

INCOR, *et al.*,

Petitioners,

v.

KENT W. FOWLER, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

STEVEN V. BUCKMAN
BUCKMAN & ROACH
A Professional Corporation
525 South Main Street, Suite 660
Tulsa, Oklahoma 74103-4521
(918) 587-1525
(918) 587-1535 facsimile

Attorney for Respondents

218419

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. Does this Court wish to review issues never presented to the district court or the circuit court of appeals?

2. Did Congress intend for there to be an exemption to payment of overtime wages under the Fair Labor Standards Act ("FSLA") when employees are required to work more than 40 hours per week in the care of mentally disabled individuals?

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COUNTERSTATEMENT OF THE CASE

Respondents were individuals employed by Petitioners (collectively called "Incor") to provide care and assistance to mentally disabled individuals (many with an I.Q. range of 9 months to 4 years of developmental age). These employees worked to wipe noses, cook, diaper, bathe, and clean up messes 80, 90, and sometimes more than 100 hours per week without receiving overtime compensation. Employees were responsible to help train, motivate, and nurture the daily activities of those charged to their care to the extent possible. The work was demanding and required patience, alertness, and physical effort.

The Fair Labor Standards Act ("FLSA") prohibits employers from requiring employees to work in excess of 40 hours per work week without paying an overtime premium other than within limited exempt areas. The matter *sub judice* is concerned with the exemption related primarily to domestic service employment of a household nature performed by an employee in or about a private home.

Incor suggests it should be allowed *to require* employees to work excessive numbers of hours over and above the typical 40 hour work week without the benefit of overtime compensation when the work was not done in a private home. Employees are not necessarily individuals who want to contribute their entire life to taking care of others 80 to 100 hours per week, thereby depriving their own families of time, for an hourly wage barely above the minimum required.

This position is remarkably hypocritical if not overly opportunistic. Incor's officers and management did not work for below average pay, but received executive-level compensation. Even though Incor is a non-profit entity, its officers benefitted by their generous compensation packages including company vehicles. This Court should not be misled concerning Incor's opined economic plight or the industry's alleged predicament in paying overtime just as other employers are expected to do.

Incor could have paid the overtime wages owed in this dispute by simply reducing the salary of one of its officers and used the funds to pay the people actually doing the work. However, with nepotism in a family-run and controlled operation, the choice as to which officer's salary to reduce would be problematic.

REASONS FOR DENYING THE PETITION

A. The Circuit's Decision Properly Interprets The "Companionship Exemption" In The Context Of A Private Home

This action was prosecuted pursuant to the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* Petitioners claimed an exemption to payment of overtime found in the Act at 29 U.S.C. § 213(a)(15), commonly known as the companionship exemption. The exemption reads thus:

> any employee employed on a casual basis in domestic service employment to provide babysitting services or any employee employed in domestic service employment to

> provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary)

29 U.S.C. § 213(a)(15).

The companionship exemption was part of Congress' amendments to the FLSA in 1974. In that same year, the Department of Labor promulgated two regulations defining the terms domestic service employment and companionship services as authorized by Congress; 29 C.F.R. § 552.3 and 29 C.F.R. § 552.6. In promulgating these regulations, the Department of Labor codified the House of Representatives construction of what companionship service employment was intended to be.

> As used in section 13(a)(15) of the Act, the term domestic service employment refers to services of a household nature performed by an employee **in or about a private home (permanent or temporary) of the person by whom he or she is employed.** The term includes employees such as cooks, waiters, butlers, valets, maids, housekeepers, governesses, nurses, janitors, laundresses, caretakers, handymen, gardeners, footmen, grooms, chauffeurs of automobiles for family use. It also includes babysitters employed on other than a casual basis. This listing is illustrative and not exhaustive.

29 C.F.R. § 552.3 (emphasis added).

> As used in section 13(a)(15) of the Act, the term companionship services shall mean those services which provide fellowship, care and protection for a person who, because of advanced age or physical or mental infirmity, cannot care for his or her own needs. Such services may include household work related to the care of the aged or infirm person such as meal preparation, bed making, washing of clothes, and other similar services. They may also include the performance of general household work: **Provided, however, that such work is incidental, i.e., does not exceed 20 percent of the total weekly hours worked.** The term "companionship services" does not include services relating to the care and protection of the aged or infirm which require and are performed by trained personnel, such as a registered or practical nurse. While such trained personnel do not qualify as companions, this fact does not remove them from the category of covered domestic service employees when employed in or about a private household.

29 C.F.R. § 552.6 (emphasis added).

The Department of Labor has stated that these regulations, along with 29 C.F.R. §§ 552.4 and 552.5 which do not apply here, are the *only* definitions *required* by 29 U.S.C. § 213(a)(15). 29 C.F.R. § 552.2(c) [40 FR 7405, Feb. 20, 1975, as amended at 44 FR 37221, June 26, 1979; 60 FR 46767, 60 FR 46768, Sept. 8, 1995].

Thus, the elements of companionship service employment, taking due care to follow the plain meaning of the language of the statute and the intent of Congress,[1] are: (1) performing household work, (2) in the *private home* of an aged or physically or mentally infirm person. Household work includes that which relates to the care of the individual and general household work, provided such household work does not exceed 20 percent of hours worked.

In *Welding v. BIOS Corp.*, 353 F.3d 1214 (10th Cir. 2004), the Tenth Circuit Court of Appeals reaffirmed principles set forth in *Johnston v. Volunteers Of America, Inc.*, 213 F.3d 559 (10th Cir. 2000), by determining that each living unit worked in by Plaintiffs must be separately analyzed to decide whether the living arrangement is a "private home" or not. The *two inquiries* to be made to determine if a living unit in which a Plaintiff worked is private are: **(1) who has ultimate management control of the living unit and (2) is the living unit maintained primarily to facilitate the provision of assistive services.**

In making the determination, the Tenth Circuit summarized six "key" factors used to consider whether a home is "private":

1. Whether the client lived in the unit as a private home before beginning to receive services? *Welding. Id.* at 1219.

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1. *A.H. Phillips v. Walling*, 324 U.S. 490, 493, 65 S. Ct. 807, 89 L. Ed. 1095 (1945).

2. Who owns the unit, and, if owned by a third party, who leases the unit from the third party? *Welding. Id.* at 1219.

3. Who manages and maintains the unit, i.e., who provides essentials the client needs to live there (clean clothing, rent, gas, electricity, food, and water payments)? *Welding. Id.* at 1219.

4. Whether the client would be allowed to live in the unit if the client were not contracting for services? *Welding. Id.* at 1220.

5. The relative difference in the cost/value of the services provided and the total cost of maintaining the unit (including government subsides)? *Welding. Id.* at 1220.

6. Whether the service provider used any part of the unit for the providers own business purposes? *Welding. Id.* at 1220.

The circuit pointed out no single factor, nor group of factors is dispositive or absolutely essential to be determinative and each unit must be evaluated separately on a fact-by-fact basis to determine "ultimate management control". *Welding. Id.* at 1219 - 1220. The factors are logical and provide a framework for both employers and employees to use in determining if the exemption is applicable.

Where a "private home" *is* involved, the work an employee performs there must be "*domestic service employment*" such as a cook, waiter, butler, maid, housekeeper, governess, nurse, janitor, laundress, caretaker, handyman, gardener, footman, groom or chauffeur directly related to the care of the individual providing companionship services. If such services are provided in a "private home" the employer is exempted from the overtime provisions of 29 C.F.R. § 552.3. General household work must be *incidental* to the employees' job, meaning not taking more than 20% of the hours worked per week or the employees are excepted from the exemption claimed by Incor, and are owed overtime pay. 29 C.F.R. § 552.6. In that regard, Respondents prepared lengthy reports concerning training, medical history, and behavior. They were ultimately responsible for the maintenance of the units, ultimately responsible for the chores, laundry, cleaning, cooking, etc., Plaintiffs devoted between 20% and 50% of their time doing work that was not "exempt" under the FLSA.

"Companionship services" are those which provide fellowship, care and protection and can include meal preparation, bed making, washing of clothes and other similar services. But, household work (cleaning and other chores or duties not specifically advancing the training and care of the client) must not be performed more than 20% of the time or the employee *is no longer performing companionship services*. 29 C.F.R. § 552.6.

B. The Reasons Given By Petitioners For Granting Their Petition Were Not Raised In The Lower Courts

Interestingly, Petitioners advised this Court the ruling from the 10th Circuit will have a profoundly negative effect on the home healthcare sector as a whole and more employees will be needed in order to avoid payment of overtime compensation. Petitioners contend those with severe mental disabilities respond better when a fewer number of individuals work with each of the mentally disabled persons. Petitioners failed to mention the substantial turnover in their industry due to low wages, excessive work hours, and unpleasant working conditions.

In fact, the refusal to pay overtime compensation results in discrimination against these mentally impaired individuals who are completely unable to care for themselves. Respondents would suggest to this Court Incor's failure to pay overtime compensation for their excessive number of hours worked means there are fewer and fewer individuals willing to accept the job, thereby impacting the developmentally disabled's ability to receive the best available care. Employees' own financial interests are better served working at a fast-food restaurant in which overtime pay can be collected rather than providing the care to the very people Incor claims to assist.

This Court should note Petitioner was not concerned enough to raise these new reasons for granting the Petition For The Writ Of Certiorari in the lower courts. Petitioner did not assert the Americans

With Disabilities Act ("ADA") at the trial court level, nor did it raise the question with the 10th Circuit Court of Appeals even in their Application For Rehearing En Banc. Instead, Petitioner artificially created a perceived conflict for the first time in the quest for certiorari. Only in exceptional cases will this Court review questions not passed on below. *Duignan v. United States*, 274 U.S. 195, 47 S. Ct. 566, 71 L. Ed. 996 (1927).

> Of course we will not undertake to review what the court below did not decide. The state court has not passed on any question of discrimination arising from the regulations or any questions as to the interpretation or validity thereof. We have here only a very limited issue - does the statute or the ordinance on its face violate the Fourteenth Amendment.

Walters v. City Of St. Louis, MO., 347 U.S. 231, 74 S. Ct. 505, 98 L. Ed. 660 (1954).

Employees have been denied justice in this case if for no other reason than the prolonged delay of the litigation. Employees have a right to final resolution of the lawsuit without new issues to be explored for the first time at the highest court.

> Ordinarily an appellate court does not give consideration to issues not raised below. For our procedural scheme contemplates that parties shall come to issue in the trial forum vested with authority to determine questions of fact. This is essential in order that parties

> may have the opportunity to offer all the evidence they believe relevant to the issues which the trial tribunal is alone competent to decide; it is equally essential in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence.

Hormel v. Helvering, 312 U.S. 552, 556, 61 S. Ct. 719, 85 L. Ed. 1037 (1941).

C. Petitioners Misstate This Court's Holding In *Coke* And Misapply It to The Issues Herein

Petitioners assert this Court, by its opinion in *Long Island Care At Home, Ltd. v. Coke*, 127 S. Ct. 2339, 168 L. Ed. 2d 54, has "definitively expanded application of the [companionship services] exemption". In so doing Petitioners blindly overlook that *Coke* only addressed the validity of the Department of Labor ("DOL") regulation found at 29 C.F.R. § 552.109(a). That particular regulation was propounded in 1975 and has not changed since, thus upholding its validity does not "expand" any coverage. Title 29 C.F.R. § 552.109(a) does not further define what "companionship services" are nor address the factual and legal analysis of the requirement the services be provided in a "private home". Rather, its purpose was to encompass, *after "companionship services" had already been established*, workers employed by a third-party other than by the family or household using their services. 29 C.F.R. § 552.109(a). Evelyn Coke, the named party in that matter, had stipulated she provided "companionship services" for all other purposes of the exemption

specifically to narrow the issue solely to the third-party employer validity of 29 C.F.R. § 552.109(a). *See Coke v. Long Island Care At Home, Ltd.*, 376 F.3d 118, 122 (2nd Cir. 2004).

The Tenth Circuit withheld rendering an opinion in the instant litigation awaiting the *Coke* decision to ensure the facts, law, and issues at play did not overlap. *See* Appendix A, page A-5 - 6. Here, 29 C.F.R. § 552.109(a) was not at issue and that is reflected in the Tenth Circuit opinion. Employees did not appeal arguing they should receive overtime because they were paid by Incor. Employees are entitled to overtime *because they did not work in "private homes"*. "Companionship services" were not established because Defendants failed to prove the factual and legal basis required to show the residences were private homes as required by 29 C.F.R. § 552.3. (Petitioners also failed to prove by a factual and legal basis such work is not "incidental to" or occupying more than 20% of the employee's time as required by 29 C.F.R. § 552.6, however, Petitioners do not mention their lack of evidence in their Petition For Writ of Certiorari.). The opinion in *Coke* does not bear on the Tenth Circuit's decision because the issues are entirely different. As such, the Tenth Circuit's decision herein does not frustrate the purpose of *Coke* nor does it conflict. Rather, the Tenth Circuit, by addressing the "private home" requirement of 29 C.F.R. § 552.3, upheld the validity of the DOL's regulatory definition of "companionship services".

CONCLUSION

This Honorable Court is requested to deny certiorari because:

1. the circuit court's ruling is well founded, rationally based, and properly applied the applicable law;

2. Petitioners misstated the law and the facts in its Petition which casts the issue in a posture differently than the true question resolved by the circuit; and

3. issues raised by Petitioners were not litigated in the courts below and Respondents should not be required to address new issues and challenges for the first time in this forum without evidence to rebut the surprise attacks.

In conclusion, Petitioners' attempt to sway the Court with an emotional argument that developmentally disabled individuals throughout the State of Oklahoma will no longer receive the services of HTS employees under the Tenth Circuit's unpublished opinion is unfounded and without legal or factual support.

Respectfully submitted,

STEVEN V. BUCKMAN
BUCKMAN & ROACH
A Professional Corporation
525 South Main Street, Suite 660
Tulsa, Oklahoma 74103-4521
(918) 587-1525
(918) 587-1535 facsimile

Attorney for Respondents